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Benjamin M. Shieber
Louisiana State University Law Center

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SECTION 8(a) (3) OF THE NATIONAL LABOR RELATIONS ACT; A RATIONALE: PART I. DISCRIMINATION

*Benjamin M. Shieber**

INTRODUCTION

Section 8(a) (3) of the National Labor Relations Act provides that it is

“an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .”¹

Authoritative statements by Congress and the Supreme Court identify the elements of a violation of this section. The final House Report on the Wagner Act, commenting on the above language, states:

“Nothing in this subsection prohibits [*sic*, permits?] interference with the normal exercise of the right of employers to select their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in hire or tenure of employment or terms or conditions of employment, interfere with the exercise by employees of their right to organize and choose representatives. It is for this reason that *the employer is prohibited from encouraging or discouraging membership in any labor organization by such discrimination.*”²

And in *Radio Officers' Union v. NLRB*,³ a leading case, the Supreme Court said:

“The language of § 8(a) (3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished

*Professor of Law, L.S.U. Law School. The author thanks Mr. Shelby Moore, a third-year student at L.S.U. Law School, for his assistance in the preparation of this article.

1. 29 U.S.C. § 158(a) (3) (1964).

2. Emphasis added. See H.R. Rep. No. 1147, 74th Cong., 1st Sess. 19 (1934), reprinted in 2 NLRB LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 3069 (1935) [hereinafter cited as LEG. HIST.].

3. 347 U.S. 17 (1954).

by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."⁴

While these statements make it clear that two constituent elements of a Section 8(a) (3) unfair labor practice are discrimination and encouragement or discouragement of membership in a labor organization, other important questions about that section remain unresolved. These unresolved questions arise from uncertainty about the meaning of "discrimination" and confusion about the significance of employer motive. Thus, some of the following questions have not yet been authoritatively answered, and the answers to others give undue emphasis to considerations extraneous to the achievement of the purposes of the Act. Does "discrimination" occur when a employer's treatment of its employees is caused by something other than employee exercise of rights protected under the Act? Can there be "discrimination" when an employer treats all employees alike? When the Board and the courts speak of employer motive, are they referring to the events which caused the employer to discharge an employee or act in some other way with respect to its employees; or to the employer's state of mind, his pro- or anti-union animus; or to both? Notwithstanding the quoted statement from the *Radio Officers'* case, is an employer's pro- or anti-union animus an additional element of a Section 8(a) (3) unfair labor practice? If so, under what circumstances is it an element of a Section 8(a) (3) violation? Are cases that hold that Section 8(a) (3) is not violated despite the concurrence of discrimination, discouragement of union membership, and anti-union animus explicable in terms of the current or another rationale of Section 8(a) (3) ?⁵

This uncertainty and confusion is of consequence because of the importance of Section 8(a) (3) to protection of employee rights under the Act. Congress considered that section essential to give "practical meaning" to the rights of employees "to be free from employer interference in self-organization or to join or refrain from joining a labor organization."⁶ And Section 8(a) (3) still plays a vital role in protecting those rights.

4. *Id.* at 42-43; *accord*, *Teamsters, Local 357 v. NLRB*, 365 U.S. 667, 674-75 (1961).

5. See *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); *Motor Repair, Inc.*, 168 NLRB No. 148 (1968).

6. S. Rep. No. 573, 74th Cong., 1st Sess. 11, reprinted in 2 *LEG. HIST.* 2311.

"Violations of Sections 8(a) (3) and 8(b) (2) are, despite 33 years of industrial experience with [the] law, still the largest single source of all unfair labor practices, and over the years the percentage of such cases has not changed radically. In Fiscal Year 1967, for example, two out of three charges filed against employers—totaling 7,463 charges—alleged discrimination or discharge in violation of the Act. Slightly less than one out of three charges filed against unions—totaling 1,681—alleged such violations."⁷

For this reason, this article dealing with "discrimination," and a succeeding one on employer motive, attempt to contribute to clarification of Section 8(a) (3).

The Meaning of "Discrimination"

Neither the Act itself nor its legislative history contains a definition of "discrimination," and the Supreme Court has yet to define that word for the purposes of delineating the unfair labor practice set forth by Section 8(a) (3). The inexistence of an authoritative definition has resulted in Congress, the courts, and the National Labor Relations Board ascribing various meanings to "discrimination." Thus, the word sometimes has been used to refer simply to any employer adverse treatment of employees, whether or not caused by employee exercise of rights protected under Section 7 of the Act; sometimes, although not limited to employer treatment caused by employee exercise of Section 7 rights, it has been limited to employer treatment of employees that is differential, or that is based on arbitrary reasons on the part of the employer, or that is imposed by the employer in a context of employee exercise of Section 7 rights. And, in other cases, "discrimination" is taken to mean only employer treatment of employees that is caused by employee exercise of Section 7 rights.

At two points in the Act, it seems clear that Congress used "discriminate" and "discrimination" to refer to nothing more than employer adverse treatment of employees. Thus, Section 8(a) (4) provides that it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee *because* he has filed charges or given testimony under this subchapter. . . ."⁸ Here, "discharge," one form of adverse treatment of employees, is subsumed under "discriminate," which

7. Address by NLRB Chairman Frank W. McCulloch, N.Y.U. 21st Annual Conference on Labor, May 14, 1968, in 68 LAB. REL. REP. 60, 63 (1968).

8. 29 U.S.C. § 158(a) (4) (1964) (emphasis added).

is apparently used as a generic term for all forms of adverse treatment of employees. And, in the last proviso to Section 8(a)(3), "That no employer shall justify any discrimination against an employee *for* non-membership in a labor organization," "discrimination," also appears to be a generic term for all forms of adverse treatment of employees.⁹

But, at these two points in the Act, Congress qualified the words "discriminate" and "discrimination" by stating the circumstances under which employers' acts of discrimination are to fall within the scope of the statutory language. In these two situations, the Act expressly provides that the discrimination is only to come within the statutory language when it is visited upon an employee for one of the stated reasons, that he "filed charges or [gave] testimony under this Act" or that he was not a member of a labor organization. No such qualification is found in the use of the word "discrimination" to denote a Section 8(a)(3) unfair labor practice. Here, the statute speaks only of "discrimination . . . to encourage or discourage membership in any labor organization" and does not expressly limit the circumstances under which the discrimination is to come within the scope of the statutory language. Does the word as used without such qualification also mean nothing more than adverse treatment of employees? If it does, then any employer adverse treatment of employees, including treatment that was *not* caused by employee exercise of Section 7 rights, would be "discrimination" for the purposes of Section 8(a)(3). Or, must the cause of employer adverse treatment of employees be employee exercise of Section 7 rights in order to find that an employer engaged in Section 8(a)(3) "discrimination"? The courts and the Board have made statements supporting different answers to this question.

In some cases, "discrimination" is used to mean employer adverse treatment of employees that need *not* be caused by employee exercise of Section 7 rights. At one point in the *Radio Officers'* case, the Supreme Court seems to have used the word in this sense. The Court said:

"In past cases, we have been called upon to clarify the terms 'discrimination' and 'membership in any labor organization.' Discrimination is not contested in these cases: involuntary reduction of seniority, refusal to hire for an avail-

9. *Id.* § 158(a)(3) (emphasis added).

able job, and disparate wage treatment are clearly discriminatory. . . ."¹⁰

thus equating "discrimination" with any adverse treatment of employees.

Other expressions support the view that "discrimination" includes employer adverse treatment of employees that need not be caused by employee exercise of Section 7 rights. But in these cases employer adverse treatment of employees standing alone is not considered sufficient to support a finding of Section 8(a) (3) "discrimination." Additional requirements, that the treatment of employees be differential; or that it be caused by arbitrary reasons on the part of the employer; or that, though not caused by employee exercise of Section 7 rights, it be imposed by the employer in a context of employee exercise of Section 7 rights, are considered necessary. For example, Mr. Justice Clark required differential employer treatment of employees in his dissent in the *Teamsters, Local 357* case when he said,

"[T]he plain and accepted meaning of the word 'discrimination' supports my interpretation. In common parlance, the word means to distinguish or differentiate. Without good reason, we should not limit the word to mean to distinguish in a particular manner (*i.e.*, on the basis of union membership or activity) so that a finding that the hall dispatched employees without regard to union membership or activity bars a finding of violation.

"Given that interpretation of the word 'discrimination', it becomes necessary to determine the class of employee involved, and then whether *any* differences in treatment within that class are present. . . ."¹¹

And Judge Friendly, dissenting in the *Miranda Fuel* case,¹² accepted Mr. Justice Clark's requirement and added a second, saying:

"Although 'In common parlance, the word [to discriminate] means to distinguish or differentiate,' 365 U.S. at 689 (dissenting opinion), it more often means, both in common and particularly in legal parlance, to distinguish or differentiate without sufficient reason. . . . A teacher thus does not 'discriminate' simply by failing a student in an examina-

10. 347 U.S. 17, 39 (1954).

11. 365 U.S. 689-90 (1961); *NLRB v. Neuhoft Bros. Packers, Inc.* 398 F.2d 640 (5th Cir. 1968).

12. *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963).

tion, although he would by doing so against his own judgment at outside dictation."¹³

And, two cases cited with approval by the Supreme Court in *Radio Officers'* required that the employer adverse treatment of employees be imposed in a context of employee exercise of Section 7 rights.¹⁴ In one, *Cusano v. NLRB*, the court of appeals said:

"Petitioner urges as an alternative argument that whether or not a discharged employee actually makes a false statement is irrelevant so long as the employer reasonably believes he did and so long as the employer actually discharges the employee on the strength of that belief. It is true that an employer may discharge an employee for a good reason, a bad reason, or no reason at all. . . . This rule, however, is necessarily limited where an employee is engaging in activities protected by the Act. . . . We conclude that if the conduct giving rise to the employer's mistaken belief is itself protected activity, then the employer's erroneous observations cannot justify the discharge."¹⁵

On the other hand, some authorities reject the view that "discrimination" for purposes of Section 8(a) (3) includes employer adverse treatment of employees caused by reasons other than employee exercise of Section 7 rights. They hold that only treatment caused by employee exercise of Section 7 rights is "discrimination." Some of these authorities add as a requirement that the employer differentiate among its employees in its treatment of them. Others hold that differential employer treatment of employees is not necessary; discrimination is shown even if the employer treats all employees alike so long as the treatment is caused by employee exercise of Section 7 rights.

In *Teamsters, Local 357*, the majority indicated that they understood "discrimination" as used in Section 8(a) (3) to require both that the employer adverse treatment of employees be caused by employee exercise of Section 7 rights and that it be differential treatment. Mr. Justice Douglas reasoned that a union secured discharge of an employee caused by his failure to use a union hiring hall was not "discrimination" because (1)

13. *Id.* at 181.

14. See *NLRB v. Industrial Cotton Mills*, 208 F.2d 87 (4th Cir. 1953); *Cusano v. NLRB*, 190 F.2d 898 (3d Cir. 1951), cited 347 U.S. 17, 45 n.53 (1954).

15. 190 F.2d 898, 902-03 (3d Cir. 1951).

the hiring hall agreement did not provide for differential treatment of employees on the basis of their union activities and (2) neither the employer nor the union differentiated between the discharged employee and other employees on the basis of union activities. He said,

"But surely discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against 'casual employees' because of the presence or absence of union membership. The only complaint in the case was by Slater, a union member, who sought to circumvent the hiring-hall agreement. When an employer and the union enforce the agreement against union members, we cannot say without more that either indulges in the kind of discrimination to which the Act is addressed."¹⁶

And, in a concurring opinion, Mr. Justice Harlan also indicated that "discrimination" requires differentiation between employees. This appears from his statement that "the Act is not intended to interfere significantly with those activities of employer and union which are justified by nondiscriminatory business purposes, or by nondiscriminatory attempts to benefit *all* the represented employees."¹⁷ Also, Mr. Justice Harlan's quotations from the legislative history, in which he emphasizes words like "merely," "solely," and "only," appear to be directed at showing that Congress was concerned with cases in which employers differentiated among their employees on the basis of the employees' involvement in Section 7 activities.¹⁸

The contrary position, that differential employer treatment of employees is not necessary for a finding of Section 8(a) (3)

16. 365 U.S. 667, 675 (1961).

17. *Id.* at 682.

18. *Id.* at 682-83. Additional authorities that indicate that differential treatment is required are: *Radio Officers Union v. NLRB*, 347 U.S. 17, 61 (dissenting opinion) (1954); *Botany Worsted Mills*, 4 NLRB 292, 300 (1937) ("Discrimination involves an intent to distinguish in treatment of employees on the basis of union affiliations or activities, thereby encouraging or discouraging membership in a labor organization, and it is immaterial whether this be done by means of discriminatory company rules, or in the discriminatory application of non-discriminatory rules, or in the absence of any rule."); Comment, *Discrimination and the NLRB: The Scope of Board Power under Sections 8(a)(3) and 8(b)(2)*, 32 U. OF CHI. L. REV. 124, 126-27 (1964) (" 'Discrimination,' as used in section 8(a) (3), might reasonably have three meanings: (1) any differentiation or distinction; (2) any invidious distinction or differentiation based upon or motivated by union relationships; (3) differentiation or distinction without sufficient reason, a meaning commonly conveyed by use of the adjectives 'arbitrary' or 'invidious.' ")

"discrimination," is the teaching of the *Republic Aviation* case.¹⁹ That case established that "discrimination" is any employer adverse treatment of employees with respect to employment conditions caused by employee exercise of Section 7 rights,²⁰ even though the employer does not differentiate between employees on the basis of employee exercise of Section 7 rights. In *Republic Aviation*, the Court set forth and then rejected the employer's argument that "discrimination" required a showing that different employer treatment was accorded employees who had engaged in Section 7 activities than was accorded employees who had engaged in similar activities which were unrelated to Section 7. It said,

"In the *Republic Aviation* case, petitioner urges that irrespective of the validity of the rule against solicitation, its application in this instance did not violate section 8(3) . . . because the rule was not discriminatorily applied against union solicitation but was impartially enforced against all solicitors. It seems clear, however, that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employees' own time, a discharge because of violation of that rule discriminates within the meaning of section 8(3) in that it discourages membership in a labor organization."²¹

These different definitions of "discrimination" testify to the uncertainty about the meaning of that word for purposes of finding an unfair labor practice under Section 8(a) (3) of the Act. That uncertainty is plainly exhibited in the opinion of Mr. Justice Stewart, writing for the Court in *American Shipbuilding Co. v. NLRB*.²² While indicating that discrimination requires differential treatment of employees by reason of the exercise by

19. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

20. Employer favorable treatment of employees with respect to employment conditions caused by employee exercise of section 7 rights would also be "discrimination." See S. Rep. No. 573, 74th Cong., 1st Sess. 11, 2 LEG. HIST. 2310-11; cf. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). Because analysis of the meaning of "discrimination" is not affected by whether the employer treatment of employees is adverse or favorable and relatively few cases involve favorable treatment, this article generally speaks of employer adverse treatment.

21. 324 U.S. 794, 805 (1945). In the *Republic Aviation* case the court speaks of Section 8(3). From the date of the original enactment of the National Labor Relations Act by the 1935 Wagner Act to the date of enactment of the Labor Management Relations Act, 1947, in the 1947 Taft-Hartley Act, the language denoting the employer unfair labor practice now found in § 8(a) (3) appeared in § 8(3) of the Act. The 1947 Act did not make any change in this language. See 49 Stat. 452 (74th Cong., 1st Sess.) and 61 Stat. 140 (80th Cong., 1st Sess.).

22. 380 U.S. 300 (1965).

employees of Section 7 rights, the opinion equated discrimination with discouragement of union membership. The Court said:

"As this case well shows, use of the lockout does not carry with it any necessary implication that the employer acted to *discourage union membership or otherwise discriminate* against union members as such. The purpose and effect of the lockout were only to bring pressure upon the union to modify its demands. Similarly, it does not appear that the natural tendency of the lockout is severely to discourage union membership while serving no significant employer interest. In fact, it is difficult to understand what tendency *to discourage union membership or otherwise discriminate* against union members was perceived by the Board. There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that the employer conditioned rehiring upon resignation from the union."²³

In this opinion, the existing uncertainty about the meaning of "discrimination" appears to have resulted in confusing and merging two distinct elements of a Section 8(a) (3) unfair labor practice, discrimination and discouragement of union membership, into one. Any effort to alleviate this uncertainty and avoid further confusion requires that we first establish the meaning of "discrimination" as used to define a Section 8(a) (3) unfair labor practice. As an introduction to that effort, it seems useful to state the position taken herein.

I believe that "discrimination" is any change by an employer of the employment conditions of its employees caused by the exercise by employees of rights protected under Section 7 of the Act. And my view is that differential employer treatment of employees because of their exercise of Section 7 rights is *not* required for a finding of "discrimination." I submit that this definition of "discrimination" is supported by both legislative intent and the decided cases. Furthermore, "discrimination," so defined, contributes to making Section 8(a) (3) an instrument for achieving its intended policy objectives and frees its implementation from considerations that are irrelevant to the achievement of those objectives.

The most important question about the meaning of "discrimination" is whether a finding of Section 8(a) (3) "discrim-

23. *Id.* at 312 (emphasis added).

ination" can be made when the cause of an employer's treatment of its employees was something other than employee exercise of Section 7 rights. The answer to this question will not only determine the breadth of Section 8(a) (3) but, as will be shown in the following article, it will also serve to clarify the significance of employer motive in cases arising under that section. The Court has yet to give an authoritative answer to this important question. For while the Court recently stated that "discrimination in its simplest form" is employer treatment of employees caused by the fact that employees "engaged in protected concerted activity," *i.e.*, exercised their Section 7 rights, it has never explicitly rejected the possibility that more complex forms of "discrimination" may include employer treatment of employees caused by something other than employee exercise of Section 7 rights.²⁴ I believe that rejection of that possibility is warranted by the legislative history of Section 8(a) (3), the weight of the decided cases, and the goal of better achieving the policy objectives of the Act.

The difficulty involved in arriving at the correct definition of "discrimination" is increased by the fact that the question whether "discrimination" includes employer treatment of employees caused by something other than employee exercise of Section 7 rights was not dealt with explicitly in the legislative history. For although the legislative history of Section 8(a) (3) makes it clear that Congress intended to limit the scope of the prohibitions of that section to employer treatment of employees that interfered with employee exercise of Section 7 rights, this does not entail the conclusion that Congress undertook to achieve this limitation on the scope of Section 8(a) (3) by limiting "discrimination" to employer treatment of employees *caused* by employee exercise of Section 7 rights.²⁵ As it did in Section 8(a) (4), Congress may simply have used "discrimination" in Section 8(a) (3) to mean any employer treatment of employees whether or not caused by employee exercise of Section 7 rights. And Congress may have achieved the desired limitation on the prohibitions of Section 8(a) (3) by the requirement that such employer treatment of employees "encourage or discourage membership in any labor organization." This is the view adopted by Justices Clark and Whittaker in their dissent in the *Teamsters, Local 357* case:

24. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32 (1967).

25. *But cf.* Comment, *Discrimination and the NLRB*, 32 U. OF CHI. L. REV. 124, 136-40 (1964).

"The word 'discrimination' in the section [8(a)(3)], as the Board points out and I agree, includes not only distinctions contingent upon 'the presence or absence of union membership,' *ante*, p. 675, but all differences in treatment regardless of their basis. This is the 'cause' portion of the section. But § 8(a)(3) also includes an 'effect' clause which provides that the intended or inherent effect of the discrimination must be 'to encourage or discourage [union] membership.' The section has, therefore, a divided structure. Not all discriminations violate the section, but only those the effect of which is encouragement or discouragement of union membership. Cf. *Radio Officers v. Labor Board*, 347 U.S. 17, at 43. . . . Each being a requirement of the section, both must be present before an unfair labor practice exists. . . ."²⁶

While not conclusive, the legislative history of Section 8(a)(3) supports the contrary view: that by "discrimination" as used to define the unfair labor practice of Section 8(a)(3) Congress meant only employer treatment of employees that was caused by the exercise of Section 7 rights by employees. First, the fact that Congress considered the language of Section 8(a)(3) as enumerating "specific practices" and "spelling out with particularity" the "general provisions" of subsection 8(a)(1) militates against defining "discrimination" as used in Section 8(a)(3) as nothing more than adverse employer treatment of employees whether or not caused by employee exercise of Section 7 rights. Section 8(a)(1) provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," and one of the rights specified in Section 7 is "the right . . . to form, join, or assist labor organizations."²⁷ If "discrimination" as used in the Section 8(a)(3) clause making it an unfair labor practice for an employer "by discrimination . . . to encourage or discourage membership in any labor organization"²⁸ meant simply employer treatment of employees without being limited to treatment caused by employee exercise of Section 7 rights, Congress would appear to have duplicated rather than "spelled out with particularity" the provisions of Section 8(a)(1).

There is also evidence that Congress distinguished between

26. 365 U.S. 667, 688-89 (1961).

27. See 49 Stat. 452 (74th Cong., 1st Sess., 1935).

28. *Id.*

employer treatment of employees caused by employee exercise of Section 7 rights and treatment caused by other reasons, and that it understood that only the former was "discrimination" for the purposes of Section 8(a) (3). In its discussion of Section 8(a) (3), the Senate Report on the Wagner Act states:

"Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if *the right* to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that *its exercise will not result* in discriminatory treatment or loss of the opportunity for work."²⁹

Both of the above sentences suggest that Congress was assuming that the enumerated employer acts satisfied the encouragement or discouragement of membership element of Section 8(a) (3), and therefore that it was focusing its attention on the discrimination element. If it were otherwise, if there were no assumption of encouragement or discouragement of membership, there would be no reason to distinguish the situations described in the first sentence from those of the second. For, only if it is assumed that the acts of discharge for incompetence or demotion for failure to perform mentioned in the first quoted sentence discouraged membership, can there be any possible basis for believing that they might, like the circumstances mentioned in the second sentence, constitute a violation of Section 8(a) (3). Thus, while assuming that, under the circumstances enumerated in both sentences, the employer's actions discouraged membership in a labor organization, Congress stated that it was not an unfair labor practice under Section 8(a) (3) when a discharge or demotion was caused by incompetence or failure to perform, but that it was an unfair labor practice under that section when loss of the opportunity for work was caused by employee exercise of the Section 7 right to join a labor organization. Since in both sentences discouragement of membership was assumed, the statement that the circumstances presented in the first sentence did not constitute an unfair labor practice must have been based on the inexistence of "discrimination," while the indication that the circumstances presented in

29. S. Rep. No. 573, 74th Cong., 1st Sess. 11, 2 LEG. HIST. 2310-11 (1935) (emphasis added).

the second sentence did constitute an unfair labor practice must have been due to the fact that these circumstances did constitute "discrimination." Hence, when the employer adverse treatment was caused by incompetence or failure to perform, which are reasons other than employee exercise of a Section 7 right, Congress indicated that there was no "discrimination." But when the employer adverse treatment was caused by an employee's joining a labor organization, the exercise of a Section 7 right, Congress indicated that "discrimination" was present. The quoted paragraph therefore suggests that Congress understood that the line between employer treatment of employees which would constitute "discrimination" and that which would not was to be drawn on the basis of whether the cause of the employer treatment of its employees was employee exercise of Section 7 rights.

There is, in addition, evidence that Congress did not consider even adverse employer treatment of employees based on arbitrary reasons on the part of the employer to be "discrimination." The discussion of Section 8(3) in the House Report on the Wagner Act, submitted after the above discussed Senate Report,³⁰ stated:

*"Nothing in this subsection prohibits [sic, permits?] interference with the normal exercise of the right of employers to select their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in hire or tenure of employment or terms or conditions of employment, interfere with the exercise by employees of their right to organize and choose representatives. It is for this reason that the employer is prohibited from encouraging or discouraging membership in any labor organization by such discrimination."*³¹

This statement expands the permissible reasons for possible employer adverse treatment of employees from the few specifics mentioned in the Senate Report to whatever reasons were then permissible under the "normal exercise of the right of employers to select their employees or to discharge them." These included then, as now, purely arbitrary grounds.³² And, in the

30. S. Rep. No. 573 was submitted on May 1, 1935, and H.R. Rep. No. 1147 was submitted on June 10, 1935.

31. H.R. Rep. No. 1147, 74th Cong., 1st Sess. 19, 2 LEG. HIST. 3069 (1935) (emphasis added).

32. Blades, *Employment at Will vs. Individual Freedom*, 67 COLUM. L. REV. 1404 (1967).

Report, the "normal exercise of the right of employers," including adverse treatment based on arbitrary reasons, is then contrasted with "discriminatory treatment" and "such discrimination." This contrast indicates that Congress did not understand "discrimination" to include employer treatment of employees that was within "the normal exercise of the right of employers . . . to discharge," including discharge for arbitrary reasons. But, if discharge for even arbitrary reasons on an employer's part was not considered "discrimination" for purposes of Section 8(a) (3), then what was? It is, I think, reasonable to answer: only discharge and other employer treatment of employees caused by "the exercise by employees of their right to organize and choose representatives," i.e., employee exercise of Section 7 rights. The conclusion is, therefore, that Congress intended "discrimination" as used in Section 8(a) (3) to refer only to employer treatment of employees that is caused by employee exercise of Section 7 rights.

This conclusion is in accord with the court and Board decisions involving Section 8(a) (3). Except for a few cases, the continuing authority of which is questionable, the Board and the courts have not held employer action violative of Section 8(a) (3) unless the cause of the employer treatment of employees was employee exercise of Section 7 rights.³³

At times, there have been explicit statements that "discrimination" for purposes of Section 8(a) (3) is employer treatment of employees caused by employee exercise of Section 7 rights. Thus, in an early case the Board said:

33. See, e.g., cases discussed in 3 NLRB ANN. REP. 65-88 (1939). In this report, the Board said: "The Board has never held it to be an unfair labor practice for an employer to hire or discharge, to promote or demote, to transfer, lay off, or reinstate, or otherwise to affect the hire or tenure of employees or their terms or conditions of employment, for asserted reasons of business, animosity, or because of sheer caprice, so long as the employer's conduct is not wholly or in part motivated by antiunion cause." *Id.* at 65. See also cases cited in Ward, *Proof of "Discrimination" under the National Labor Relations Act*, 7 GEO. WASH. L. REV. 797 (1939), and Ward, *Discrimination Under the National Labor Relations Act*, 48 YALE L.J. 1152, 1187-1192 (1939).

Even in those cases in which the Court states that the conduct involved "is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive" (See NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967)), the cause of the adverse employer treatment of employees has been employee exercise of section 7 rights. In NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), one of the cases in this category, the cause of the employer adverse treatment of its employees (the grant of super-seniority to other employees) was their exercise of the section 7 right to strike. In another case in this category, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), the cause of the employer adverse treatment of the employee (discharge of the employee) was his exercise of the section 7 right to solicit other employees to become union members.

"Discrimination involves an intent to distinguish in treatment of employees on the basis of union affiliations or activities, thereby encouraging or discouraging membership in a labor organization. . . ." ³⁴

And a court of appeals made a similar statement in analyzing the elements of a Section 8(a) (3) violation. That court said:

"When a charge is made that by firing an employee the employer has exceeded the lawful limits of his right to manage and to discipline, substantial evidence must be adduced to support at least three points. First, it must be shown that the employer knew that the employee was engaging in some activity protected by the Act. Second, it must be shown that the employee was discharged because he had engaged in a protected activity. *NLRB v. Reynolds International Pen Co.*, 162 F.2d 680 (7th Cir. 1947); *NLRB v. Citizens News Co.*, 134 F.2d 970 (9th Cir. 1943); *Interlake Iron Corp. v. NLRB*, 131 F.2d 129 (7th Cir. 1942). Third, it must be shown that the discharge had the effect of encouraging or discouraging membership in a labor organization. . . . The first and second points constitute discrimination and the practically automatic inference as to third point results in a violation of § 8-a-3. . . .

"...

"In order to supply a basis for inferring discrimination, it is necessary to show that one reason for the discharge is that the employee was engaging in protected activity." ³⁵

Finally, according to Justices Clark and Whittaker, dissenting in *Teamsters, Local 357 v. NLRB*,

"[T]he Court agree[d] that there can be no 'discrimination' within the section *unless it is based on* union membership, *i.e.*, members treated one way, nonmembers another, with further distinctions, among members, based on good standing. . . ." ³⁶

34. *Botany Worsted Mills*, 4 N.L.R.B. 292, 300 (1937). See *A. S. Abell Co.*, 5 N.L.R.B. 644, 654 (1938), *enforced in part*, 97 F.2d 951 (4th Cir. 1938): "While we believe Thamert's membership in the Union may have been responsible for the treatment of which he complained, we consider that treatment to constitute discrimination of so minor a nature as not to warrant a finding that the respondent discriminated, within the meaning of the Act, in regard to Thamert's condition of employment."

35. *NLRB v. Whitin Machine Works*, 204 F.2d 883, 884-85 (1st Cir. 1953). *Accord*, *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966), *Colecraft Mfg. Co. v. NLRB*, 385 F.2d 998, 1004 (2d Cir. 1967); 24 NLRB ANN. REP. 62 (1960).

36. 365 U.S. 667, 689 (1961) (emphasis in original); *accord*, *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963); *NLRB v. Teamsters, Local 294*,

In a few cases, the Board and courts of appeals have held that employer adverse treatment of employees constituted "discrimination" even though caused by reasons other than the employee's exercise of Section 7 rights, since the treatment occurred in a context of employee exercise of Section 7 rights.³⁷ Two of those cases, *Cusano v. NLRB* and *NLRB v. Industrial Cotton Mills*, were cited with approval by the court in the *Radio Officers* case.³⁸ In these two cases, after finding that the cause of the adverse treatment of an employee was the employer's honest but mistaken belief that he had engaged in misconduct, the Board held that the employers' actions were unfair labor practices in violation of both Sections 8(a) (1) and 8(a) (3) of the Act. The courts enforced the Board's orders. They reasoned that, if they were to hold no unfair labor practice was committed when an employer's honest but mistaken belief in employee misconduct resulted in adverse treatment of employees engaged in protected activities, they "would materially weaken the guarantees of the act for the extent of the employees' protected rights would be made to vary with the state of the employer's mind."³⁹

However, in a similar case, a court of appeals denied enforcement of the Board's order on the ground that there was no unfair labor practice unless the cause of the employer's acts was employee "union activity." The court said:

"[T]here is a fatal defect in the finding of examiner and board that, even if the employers in good faith believed . . . that Rawlins was a brawler, and discharged him in good faith because they so believed, and not for his union activities, the discharge could be held discriminatory unless the employer assumed and discharged the burden . . . that the belief was well founded.

" . . .

"This court, and we think, all other courts have held to the

317 F.2d 746 (2d Cir. 1963); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937): "The act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. . . ."

37. *NLRB v. Cambria Clay Products Co.*, 215 F.2d 48 (6th Cir. 1954), enforcing 106 N.L.R.B. 267 (1953); *NLRB v. Industrial Cotton Mills*, 208 F.2d 87 (4th Cir. 1953), cert. denied, 347 U.S. 935 (1954), enforcing 102 N.L.R.B. 1265 (1953); *Cusano v. NLRB*, 190 F.2d 898 (3d Cir. 1951), enforcing 92 N.L.R.B. 1272 (1951); see Meltzer, *The Lockout Cases*, 1965 SUP. COURT REV. 87, 113.

38. 347 U.S. 17, 45, n.53 (1954).

39. 190 F.2d 898, 902 (3d Cir. 1951).

contrary. If anything is settled in labor law and under the act, we think it is that membership in a union does not guarantee the member against discharge as such. It affords protection against discharge only where it is established that the discharge is because of union activity."⁴⁰

In none of these cases did the Board or the court of appeals distinguish between Section 8(a)(1) and Section 8(a)(3). Either violations of both sections were found or no violation was found.

The Board and the Court of Appeals for the Fifth Circuit followed the same course in the *Burnup and Sims* case.⁴¹ The Board held that, when the cause of discharge of two employees engaged in Section 7 activities was their employer's honest but mistaken belief that they had threatened to dynamite the plant if the union that they were supporting was not chosen to represent the employees, the discharge violated Sections 8(a)(1) and 8(a)(3) of the Act. The court of appeals denied enforcement of the Board's order, finding that the discharge was not "discrimination discouraging protected activity" and that neither Section 8(a)(1) nor Section 8(a)(3) had been violated.⁴² The Supreme Court reversed the court of appeals.⁴³ But, in so doing, the Court cast great doubt on the continued authority for purposes of Section 8(a)(3) of the *Cusano* and *Industrial Cotton Mills* cases, since it expressly refused to consider whether Section 8(a)(3) had been violated and based its decision only on Section 8(a)(1).⁴⁴ The Court concluded that it was a violation of Section 8(a)(1) for an employer to discharge an employee engaged in activities protected under Section 7 of the Act on the basis of an honest but mistaken belief of misconduct because "otherwise the protected activity would lose some of its immunity" since "a protected activity acquires a precarious status if innocent employees can be discharged while engaging in it even though the employer acts in good faith."⁴⁵

The refusal by the Supreme Court to find a Section 8(a)(3) unfair labor practice in the *Burnup and Sims* case, the fact that *Cusano* and *Industrial Cotton Mills* deal with Sections 8(a)(1)

40. See *Rubin Bros. Footwear, Inc. v. NLRB*, 203 F.2d 486, 487-88 (5th Cir. 1953).

41. *NLRB v. Burnup & Sims, Inc.*, 322 F.2d 57 (5th Cir. 1963), *modifying and enforcing* 137 N.L.R.B. 766 (1962).

42. 322 F.2d 51, 61 (1963).

43. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

44. *Id.* at 22.

45. *Id.* at 23.

and 8(a) (3) indiscriminately without attempting any analysis of Section 8(a) (3) issues, and the fact that these cases stand isolated in the great mass of Section 8(a) (3) cases in which the cause of employer treatment of employees was employee exercise of Section 7 rights, lead to the conclusion that these decisions are no longer authoritative insofar as Section 8(a) (3) is concerned. Therefore, their holdings can be rejected to the extent that they are authority for the proposition that "discrimination" for purposes of Section 8(a) (3) may be found although the cause of employer treatment of employees was something other than employee exercise of Section 7 rights when the employer treatment of employees occurs in a context of employee exercise of Section 7 rights.

In addition to the cases dealing with an employer's honest but mistaken belief of employee misconduct, another line of cases has been understood by some as holding that discrimination within Section 8(a) (3) may occur even though the cause of the employer treatment of an employee is not employee exercise of Section 7 rights. These cases involve employer treatment of employees based on union requests, when the reason for the union request is not a matter that is normally considered a matter of union concern, but some other reason, such as personal animosity on the part of a union officer.

As stated by Board members McCulloch and Fanning in their *Miranda Fuel* case dissent:

"[T]he discrimination which §§ 8(b) (2) and 8(a) (3) outlaw is that related to 'union membership, loyalty, acknowledgment of union authority, or the performance of union obligations.'"⁴⁶

In the view of these Board members and those judges who agree with them, when a union's request to an employer for adverse treatment of an employee is based on personal animosity of a union officer or arbitrary grounds, *e.g.*, because the employee is a "troublemaker" and "no good,"⁴⁷ it cannot be said that there was "discrimination" within Section 8(a) (3) because the cause of the union-requested treatment of the employee was not related to "union membership, loyalty, acknowledgment of union authority, or the performance of union obligations."

Were this analysis correct, the Board's holding in *Miranda*

46. *Miranda Fuel Co.*, 140 N.L.R.B. 181, 197 (1962).

47. See *NLRB v. Teamsters, Local 294*, 317 F.2d 746, 751 (2d Cir. 1963).

Fuel and other cases would indeed support the view that "discrimination" for the purposes of Section 8(a)(3) may occur when employer treatment of employees is caused by something other than employee exercise of Section 7 rights. But the analysis is incorrect. It fails to recognize that whenever an employer treats an employee adversely with respect to his employment conditions at the request of a union, that employer treatment is caused by employee exercise of Section 7 rights and is therefore "discrimination" within Section 8(a)(3). Employer treatment of an employee at the request of a union is always related to "union membership, loyalty, the acknowledgment of union authority, or the performance of union obligations."

Among the rights of employees protected by Section 7 is the "right to join unions, [and to] be good, bad, or indifferent members"⁴⁸ Sections 8(a)(3) and 8(b)(2) protect this right. As the Court said in the *Radio Officers'* case:

"The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperilling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to § 8(a)(3) which authorizes employers to enter into certain union security contracts. . . ."⁴⁹

Unfortunately, in some unions, "union membership, loyalty, acknowledgment of union authority, or the performance of union obligations" requires not only "following the union's desired hiring practices,"⁵⁰ observing the union's rules with respect to working with persons who are members of a different craft union,⁵¹ and even abstaining from supporting an opposition candidate to an incumbent union officer in a union election,⁵² but also the obligation to satisfy the racist policies of the union,⁵³ the obligation never to have been found guilty of a morally re-

48. *Radio Officers Union v. NLRB*, 347 U.S. 17, 40 (1954).

49. *Id.*

50. See *id.* at 42; *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (1963).

51. See *Ironworkers, Local No. 207 v. Perko*, 373 U.S. 701, 704 n.2 (1963).

52. See *NLRB v. A. & B. Zinman, Inc.*, 372 F.2d 444 (2d Cir. 1967).

53. See, e.g., *Houston Maritime Assn., Inc.*, 168 N.L.R.B. No. 83 (1967); *Cargo Handlers, Inc.*, 159 N.L.R.B. 321 (1966); Jacobson, *Union Conservatism: A Barrier to Racial Equality in THE NEGRO AND THE AMERICAN LABOR MOVEMENT* 17-20 (ed. Jacobson 1968).

prehensible act, even in the distant past,⁵⁴ the obligation not to have signed the Stockholm peace petition,⁵⁵ and recently the obligation not to unload shipments of de Gaulle and Mao dolls into the United States.⁵⁶

The Board and the courts have concluded that an employee's Section 7 right to be a good, bad, or indifferent union member "without imperilling [his] livelihood" includes the right to observe or disregard a union's strictures with respect to hiring practices,⁵⁷ working with employees who belong to a different craft union,⁵⁸ joining a strike called in accordance with fair union procedures,⁵⁹ and opposing an incumbent union officer for election to local union office.⁶⁰ There is no reason to arrive at any different conclusion about an employee's decision to observe or disregard a union's strictures about what race an employee should be a member of, his politics, or his over-all ability to avoid impressing one of the officers of his union as a "troublemaker" who is "no good." These matters, too, are union obligations when a union has chosen to make them so for the very reason that the union has chosen to make them so. With respect to these matters, too, employees have the right under Section 7 to be good, bad, or indifferent union members "without imperilling their livelihood."

Indeed, there is less justification for allowing a union to induce adverse employer treatment of employees with respect to their livelihood for arbitrary reasons than there is for allowing it to affect employees' livelihoods for reasons that are usually matters of union concern. For while union-induced employer action because of matters that are within the usual area of union concern may serve societal ends, actions based on arbitrary reasons do not. Thus, while society may derive some benefit from a union's rules on hiring practices which distribute available work equitably to all persons attached to an industry,⁶¹ or its rules on joining a strike called in accordance with fair union

54. 97 CONG. REC. 6062 (1951) (remarks of Senator Taft).

55. See statement of George J. Bott, then NLRB Counsel, in *HEARINGS ON PROPOSED REVISIONS OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 BEFORE THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE*, 83d Cong., 1st Sess. 2150, n.5 (1953), cited in *SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* ch. 6, n.86 (1966).

56. *N.Y. Times*, May 28, 1968, at 93, col. 8.

57. See *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954); *Teamsters, Local 676*, 172 N.L.R.B. no 58 (1968).

58. See *Ironworkers, Local No. 207 v. Perko*, 373 U.S. 701 (1963).

59. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

60. See *NLRB v. A. & B. Zinman, Inc.*, 372 F.2d 444 (2d Cir. 1967).

61. See, e.g., *Teamsters, Local 676*, 172 N.L.R.B. No. 58 (1968).

procedures which may aid in inducing an employer to raise wages to a prevailing industry level,⁶² society does not benefit by permitting the racist or political theories that a particular union may hold to be enforced by means of union-induced employer treatment of employees.

It is clear that Congress intended that some union-induced employer treatment of employees with respect to their employment conditions should be considered "discrimination" for the purposes of Section 8(a) (3) when the basis for the union's request was a matter that usually concerns unions.⁶³ This being so, there is no reason to believe that Congress excluded union-induced employer treatment of employees with respect to their employment conditions for reasons of arbitrariness on the part of the union or its officers, treatment that has no social utility, from the category of "discrimination," thereby exempting such union actions from Section 8(b) (2).

Furthermore, to hold that such Union induced adverse treatment of employees for arbitrary reasons is not "discrimination" for the purposes of Section 8(a) (3) would greatly weaken the protection of employees' job rights even in those situations in which all agree that union-induced employer adverse treatment of employees is "discrimination." For example, a union officer intent on enforcing a union rule prohibiting work during a strike would only need to exercise patience and circumspection to find a permissible arbitrary reason, as distinguished from an employee's insistence on working during a strike, to insist on the discharge of the employee some time after the end of the strike. Surely, Congress did not intent that "8(a) (3) and 8(b) (2) . . . designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperilling their livelihood" should be set at nought whenever a union could prove that its reason for inducing employer adverse treatment of an employee was an arbitrary one.⁶⁴

I therefore conclude that whenever an employer treats an employee adversely at a union's behest, Section 8(a) (3) "discrimination," in accordance with the definition which I believe to be correct, *i.e.*, employer treatment of employees caused by employee exercise of Section 7 rights, occurs. In all such cases,

62. See, *e.g.*, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

63. See *Radio Officers Union v. NLRB*, 347 U.S. 17, 40-42 (1954); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967).

the cause of the employer adverse treatment of employees is employee exercise of Section 7 rights, specifically, the right to be a good, bad, or indifferent union member, since it is the employee's exercise of this right in a manner unsatisfactory to the union that causes the union request for employer adverse treatment of the employee. Accordingly, neither *Miranda Fuel*⁶⁴ nor any of the other cases⁶⁵ dealing with union-induced employer adverse treatment of employees hold that "discrimination" for purposes of Section 8(a)(3) includes employer treatment of employees caused by reasons other than employee exercise of Section 7 rights.

In *NLRB v. Teamsters, Local 294*,⁶⁷ the Court of Appeals for the Second Circuit rejected the view that any union-caused employer treatment of employees constituted "discrimination" within Section 8(a)(3). The court indicated that a union does not violate Section 8(b)(2) unless the employer action which the union seeks to induce would violate Section 8(a)(3) if the employer complied with the union's request.⁶⁸ This is correct. "[S]ection [8(b)(2)] requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8(a)(3)."⁶⁹ But the court then altered this accepted interpretation of Section 8(b)(2). It said:

"The union does not commit an unfair labor practice merely because it causes or attempts to cause an employer to promote or demote an employee or to discriminate for or against him. In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) discrimination in seniority which was adopted at the behest of the union was found unexceptionable. In *Aeronautical etc. v. Campbell*, 347 U.S. 521 (1949), the Court gave its approval to super-seniority for union officials which was, of course, a practice proposed by the union. *Local 357 etc. v. NLRB*, 365 U.S. 667 (1961), held that it was not an unfair labor practice for a union to cause the discharge

64. A stated "purpose and policy" of the Labor Management Relations Act, 1947, which added Section 8(b)(2) to the National Labor Relations Act, was "to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce . . ." 29 U.S.C. § 141(b) (1947).

65. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

66. See, e.g., *Houston Maritime Assn., Inc.*, 168 N.L.R.B. No. 83 (1967); *Cargo Handlers, Inc.*, 159 N.L.R.B. 321 (1966); *Plumbers, Local 675*, 161 N.L.R.B. 1351 (1966).

67. 317 F.2d 746 (2d Cir. 1963).

68. *Id.* at 749.

69. *Radio Officers Union v. NLRB*, 347 U.S. 17, 53 (1954).

of an employee because he was hired ahead of other men to whom the union had assigned preference. . . .

" . . .

"These authorities establish the principle that a union does not violate Section 8(b) (2) unless the discrimination which the union seeks would constitute a violation of Section 8(a) (3) if the employer acted without union suggestion or compulsion. . . ." ⁷⁰

The court thus implied that only if the employer's actions would violate Section 8(a) (3) when they were performed independently of "union suggestion or compulsion" could they violate Section 8(a) (3) if performed upon "union suggestion or compulsion."

Thereby, the court in *Local 294* eliminated the fact that the employer's treatment of employees would be carried out at union behest from consideration on the issue of whether the employer's conduct "if committed, would violate § 8(a) (3)." But this factor of "union suggestion or compulsion" cannot be eliminated from consideration. The fact that employer treatment of employees is induced by a union changes the nature of the employer's action for purposes of Section 8(a) (3).

The *Campbell* case, one of the cases on which the court of appeals relied as a basis for its stated "principle," and the *Radio Officers'* case illustrate the significance of union inducement of employer action. "In *Aeronautical etc. v. Campbell*, 347 U.S. 521 (1949), the Court gave its approval to super-seniority for union officials which was, of course a practice proposed by the union." Instead of supporting the view that union-induced employer action can only be a violation of 8(a) (3) when the same employer action performed independently would be a violation of Section 8(a) (3), the *Campbell* case actually opposes that view. It is clear that an employer's grant of super-seniority to union officials because of their union position independent of any union request would be violative of Section 8(a) (3) as "discrimination" that "encourages membership in a labor organization," ⁷¹ yet the same employer action when induced by a union was approved by the Supreme Court. Thus, the fact that an employer's action in giving union officials super-seniority is

70. 317 F.2d 746, 748-49 (2d Cir. 1963).

71. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

union induced prevents the employer's action from violating Section 8(a) (3).

In the *Radio Officers'* case, union dissatisfaction with the manner in which an employee secured a job on a ship (because it entailed "bumping" another employee off the job) caused the union to induce the employer to refuse to hire the employee.⁷² It is clear that if, for the same reason, the employer had refused to hire the employee independently of union inducement, its action would not have been in violation of Section 8(a) (3). Yet, the fact that the employer's refusal to hire the employee was union induced sufficed to make that conduct a violation of Section 8(a) (3).⁷³

It is clear, therefore, that, if employer treatment of employees is union induced, that is a relevant fact in determining whether the employer's treatment of employees violated Section 8(a) (3). As has been shown, whenever employer treatment of employees is union induced, the employer's action constitute "discrimination" for the purposes of Section 8(a) (3) because they are caused by employee exercise of the Section 7 right to be a good, bad, or indifferent union member.

That employer treatment of employees taken at union behest always constitutes "discrimination" for the purposes of Section 8(a) (3) does not, however, imply that all such employer treatment is violative of Section 8(a) (3). In order to find that Section 8(a) (3) has been violated, not only "discrimination" but also the second element of a violation, encouragement or discouragement of membership in a labor organization, must be found. Not all employer actions that are "discrimination" encourage or discourage membership in a labor organization for the purposes of Section 8(a) (3). When they do not, the employer actions do not constitute an unfair labor practice under that section. This, as we shall see in the succeeding article, is the basis upon which the union-induced employer actions in the *Teamsters, Local 357* case⁷⁴ and the other cases mentioned by

72. See 347 U.S. 17, 30 (1954).

73. See *Radio Officers Union v. NLRB*, 347 U.S. 17, 52-54 (1954); *Teamsters, Local 676*, 172 N.L.R.B. 58 (1968).

74. 365 U.S. 667 (1961). This analysis of union-induced employer treatment of employees would require a finding of "discrimination" in the *Teamsters, Local 357* case, which is contrary to the views of the majority expressed in the opinions of Justice Douglas and Harlan. See pages 51-52 *supra*. The holding of the case, that a union induced discharge of an employee for failure to use a union operated hiring hall is not violative of either § 8(a) (3) or § 8(b) (2), would then be based on the nonexistence of encouragement or discouragement of union membership for the purposes of § 8(a) (3). This alternative is hinted at in

the court of appeals in the *Local 294* case fall outside the prohibition of Section 8(a) (3).⁷⁵

Thus, the Board majority's decision in the *Miranda Fuel* case and the cases following it do not stand for the proposition that discrimination within Section 8(a) (3) can occur when employer treatment of employees is based on something other than employee exercise of Section 7 rights. As we have seen, in all of these cases, the cause of the employer treatment of employees was employee exercise of Section 7 rights. These cases, like the great bulk of those involving employer treatment of employees independent of union request, also hold that "discrimination" for the purposes of Section 8(a) (3) requires that an employer's treatment of his employees be caused by employee exercise of Section 7 rights.

We have concluded that, in order to find that "discrimination" for the purposes of Section 8(a) (3) occurred, it must be found that the employer treatment of its employees was caused by employee exercise of Section 7 rights.⁷⁶ But we are still faced with resolving whether "discrimination" requires that the employer treatment of employees be differential. The view that differential employer treatment of employees is required has been expressed by the Board, courts, and commentators.⁷⁷

There are two possible forms of differential employer treatment of employees caused by employee exercise of Section 7 rights. The differential employer treatment may be either adverse or favorable treatment of the employees involved in the exercise of Section 7 rights *as compared with* (1) the treat-

the opinions of Justices Douglas and Harlan (*see* 365 U.S. 667, 675-76, 679-80, 684 (1961)), and it has been accepted by the Board as the rationale of the case. *See* note 75 *infra*; *Hod Carriers, Local 7*, 135 N.L.R.B. 865, 866 (1962). *See also* *NLRB v. Miranda Fuel Co.*, 326 F.2d 172, 185 (2d Cir. 1963) (dissenting opinion).

75. *See* *Miranda Fuel Co.*, 140 N.L.R.B. 181, 187-88 (1962): "As we read *Local 357*, the Supreme Court did not overrule its holding in *Radio Officers* that union membership is encouraged or discouraged whenever a union causes an employer to affect an individual's employment status. What it does hold, in our opinion, is that an 8(a)(3) or 8(b)(2) violation does not necessarily flow from the conduct which has the foreseeable result of encouraging union membership, but that given such 'foreseeable result' the finding of a violation may turn upon an evaluation of the disputed conduct 'in terms of legitimate employer or union purposes.'"

76. It is clear that "discrimination" may be found even though the actions of the employer cannot be considered arbitrary. *See e.g.*, *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *contra*, Judge Friendly dissenting in *NLRB v. Miranda Fuel Co.*, 326 F.2d 172, 181 (2d Cir. 1963); Meltzer, *The Lockout Cases*, 1965 SUP. CT. REV. 87, 100.

77. *See* pages 50-51 *supra*.

ment of other employees who are not involved in the exercise of Section 7 rights, *e.g.*, the discharge by the employer of employees engaged in union solicitation and the retention of all other employees; or (2) *what* the treatment of the same employees would be because of their involvement in similar activities that are unrelated to the exercise of Section 7 rights, *e.g.*, the transfer of all employees to a less desirable employee classification because they had joined a labor union, when employee affiliation with a fraternal or patriotic organization would not have resulted in such a transfer.

Whether either of these forms of differential treatment is necessary to support a finding of discrimination for the purposes of Section 8(a) (3) was never discussed in Congress. The examples of discrimination discussed prior to the passage of the Wagner Act involved employer differential treatment of employees, *e.g.*, discharging an employee who joins a labor organization and denying employment to employees and applicants for employment who refuse to sign a yellow-dog contract.⁷⁸ Hence, the legislative history of Section 8(a) (3) provides no guidance.

Nor was there any occasion for the Supreme Court to address itself to this question in the first Wagner Act cases. In those cases, the employer was charged with having visited adverse treatment on employees because of their activities on behalf of labor organizations, and the cause of the adverse treatment of the employees was their exercise of Section 7 rights.⁷⁹ The employers did not contend that they had not engaged in differential treatment of employees; that they treated all employees in the same way or that they would have reacted in the same way to employee activities on behalf of social organizations. So it was not necessary to determine whether absent any differential treatment of employees an employer could be found to have practiced "discrimination" for purposes of Section 8(a) (3).

At an early point in the administration of the Act, it was established that "although no difference is made in the treat-

78. See S. Rep. No. 1184, 73d Cong., 2d Sess. 6 (1934), 1 LEG. HIST. 1105; 79 CONG. REC. 7570 (1935), 2 LEG. HIST. 2335 (remarks of Senator Wagner); 79 CONG. REC. 7658 (1935), 2 LEG. HIST. 2370 (remarks of Senator Walsh).

79. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); Associated Press v. NLRB, 301 U.S. 103 (1937); Washington, Va. & Md. Coach Co. v. NLRB, 301 U.S. 142 (1937).

ment of union members and non-union employees," "discrimination" could still be found.⁸⁰ Thus, differential employer treatment of the employees involved in the exercise of Section 7 rights *as compared with* the treatment of other employees who are not involved in the exercise of Section 7 rights is not a prerequisite to a finding of Section 8(a) (3) "discrimination." This rule has been followed consistently in cases in which all employees in a bargaining unit are treated adversely because of employee exercise of Section 7 rights and in other cases.⁸¹

But it remained unsettled whether it was necessary to a finding of "discrimination" to have differential employer treatment of employees involved in the exercise of Section 7 rights *as compared with* what the treatment of the same employees would be because of their involvement in similar activities that were unrelated to the exercise of Section 7 rights.

In *NLRB v. Mackay Radio & Telegraph Co.*,⁸² this issue was presented. The employees engaged in a lawful economic strike during which the employer hired eleven replacements to whom it promised permanent positions. After the strike, only five of the eleven permanent replacements chose to retain their jobs and the employer reinstated six strikers and denied reinstatement to five. In choosing which of the eleven strikers it would reinstate, the employer used as the criterion the extent to which they had engaged in Section 7 activities. Those least active in support of the strike were reinstated in preference to the more active. Two questions involving Section 8(a) (3) were presented by the facts: first, whether the use of the criterion adopted by the employer in choosing which of the eleven strikers it would reinstate to the six available jobs violated Section 8(a) (3); and second, whether the promise of permanent employment to the replacements and the fulfillment of that promise to the detriment of striking employees violated Section 8(a) (3).⁸³

80. See Ward, "Discrimination" under the National Labor Relations Act, 48 YALE L.J. 1152, 1170-71 (1939).

81. *Allis-Chalmers Mfg. Co. v. NLRB*, 162 F.2d 435 (7th Cir. 1947); *General Motors Corp.*, 59 N.L.R.B. 1143 (1944), *enforced*, 150 F.2d 201 (3d Cir. 1945); *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3d Cir. 1943), *cert. denied*, 321 U.S. 718 (1944) (employer treatment of an employee who had previously enjoyed a sinecure in the same way as other employees because of his exercise of Section 7 rights, held "discrimination" in violation of section 8(a) (3)); see *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263, 271-72, 274 (1965); Ward, *Discrimination under the National Labor Relations Act*, 48 YALE L.J. 1152, 1170-71 (1939).

82. 304 U.S. 333 (1938).

83. Since the *Mackay* case was decided before the 1947 amendments to the National Labor Relations Act, the opinion refers to Section 8(3) rather than Section 8(a) (3).

With respect to the first issue, the Court held that "discrimination in reinstating striking employees by keeping out certain of them for the sole reason that they had been active in the union" was prohibited by Section 8(a) (3).⁸⁴ This aspect of the case did not involve the question of whether differential treatment was required before a violation of Section 8(a) (3) could be found because the Court accepted the Board's finding that the employer had treated the more active union supporters different from the other strikers.⁸⁵

On the second issue, the Court held that an employer does not violate Section 8(a) (3) when it promises replacements for economic strikers permanent employment and abides by its promise to the detriment of the strikers. It is not correct to conclude from the provisions of the Act, said the Court that

"an employer guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. . . ."⁸⁶

While the holding of *Mackay* on this issue is clear, the rationale supporting the holding is not set forth in Mr. Justice Roberts' opinion. The holding is that after an economic strike, when strikers, who "retained under the Act, the status of employees"⁸⁷ and replacements, who are also employees, are competing for a number of jobs that is smaller than the then total number of available employees (strikers plus replacements), the employer may give the jobs to those employees who did not join the strike.

There are two possible bases for the holding in *Mackay*. One

84. 304 U.S. 333, 346 (1938).

85. *Id.* at 346-47.

86. *Id.* at 345-46.

87. *Id.* at 346.

is that there was no "discrimination" for the purposes of Section 8(a)(3), when the employer promised the replacements permanent employment and then fulfilled its promise after the strike. It could be reasoned that there was no "discrimination" because there was no differential employer treatment of the employees by reason of their exercise of their Section 7 right to strike. The employer would have treated any employee who left work without permission in the same way, *i.e.*, by hiring a permanent replacement for him, whatever the employee's reason for stopping work may have been: to go fishing, to take an unauthorized vacation, or to strike.⁸⁸

The second is that, although there was "discrimination," no unfair labor practice was committed because the employer did not "encourage or discourage membership in a labor union" in violation of Section 8(a)(3).

Since the Court did not set forth the basis for its holding in *Mackay*, it evoked the possibility that the case established that "discrimination" for purposes of Section 8(a)(3) required differential employer treatment of employees because of employee involvement in Section 7 activities, *as compared with* what treatment of the same employees would have been because of their involvement in similar activities unrelated to Section 7.

Thus, prior to the Court's decision in *Republic Aviation*,⁸⁹ it was clear that, when an employer treated its employees differentially because of employee exercise of Section 7 rights, it engaged in discrimination within Section 8(a)(3) of the Act. And, the *Mackay* case provided some support for the view that such differential treatment was a necessary element of Section 8(a)(3) discrimination. *Republic Aviation*, however, indicated that this was a misreading of the *Mackay* case. In *Republic Aviation*, the Court held that differential employer treatment of employees is not a prerequisite to a finding of Section 8(a)(3) "discrimination." The Court there dealt specifically with the issue whether "discrimination" requires that an employer differentiate in its treatment of employees on the basis of their exercise of Section 7 rights as compared with what the treatment of the employees would have been for identical activities unrelated to the exercise of Section 7 rights.

88. *Cf. Pittsburgh-Des Moines Steel Co. v. NLRB*, 284 F.2d 74, 84-85 (9th Cir. 1960).

89. 324 U.S. 793 (1945). Since this case was decided before the 1947 amendments to the National Labor Relations Act, the opinion refers to Section 8(3) rather than Section 8(a)(3).

In its statements of the facts, the Court accepted that the employer's act of discharging an employee for union solicitation on plant premises did not involve any singling out of union activity for adverse consequences.

"In the *Republic Aviation Corporation* case, the employer . . . adopted, well before any union activity at the plant, a general rule against soliciting which read as follows:

"Soliciting of any type cannot be permitted in the factory or offices."

". . . An employee persisted after being warned of the rule in soliciting union membership in the plant by passing out application cards to employees on his own time during lunch periods. *The employee was discharged for infraction of the rule*, and, as the National Labor Relations Board found, *without discrimination on the part of the employer toward union activity.*"⁹⁰

Moreover, the Court set forth and rejected the employer's argument that "discrimination" required differential employer treatment of employees because of Section 7 activities.

"In the *Republic Aviation* case, petitioner urges that irrespective of the validity of the rule against solicitation, its application in this instance did not violate section 8(3), . . . because the rule was not discriminatorily applied against union solicitation but was impartially enforced against all solicitors. It seems clear, however, that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employees' own time, a discharge because of violation of that rule discriminates with the meaning of section 8(3) in that it discourages membership in a labor organization."⁹¹

Thus, *Republic Aviation* held that "discrimination" does not require differential employer treatment of employees because of employee exercise of Section 7 rights. All that is required to support a finding of Section 8(a)(3) "discrimination" is employer treatment of employees affecting their employment conditions caused by employee exercise of Section 7 rights.⁹² And

90. *Id.* at 794-95 (emphasis added).

91. *Id.* at 805.

92. *Accord*, Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. OF CHI. L. REV. 735, 737 (1965): "But it is clear that the Court used discrimination to signify something other than a distinction between employees. The only way in which it may properly be said that the employer discriminated was in treating these employees differently from the

since *Republic Aviation*, the Court has made it clear that the *Mackay* decision was not based on a finding of no "discrimination" but on a finding that discouragement of employees in violation of Section 8(a)(3) of the Act does not occur when an employer hires permanent replacements for economic strikers.⁹³ Further, the established rule that an employer violates Section 8(a)(3) when it refuses to reinstate unfair labor practice strikers also supports our conclusion that "discrimination" does not require differential employer treatment of employees.⁹⁴ An employer's refusal to reinstate unfair labor practice strikers does not cease to be "discrimination" because the employer would refuse to reinstate any employee who absented himself from work without excuse whatever the reason for the absence, an unfair labor practice strike, an economic strike, or a fishing trip.⁹⁵

CONCLUSION

We have therefore arrived at the following conclusions about the meaning of "discrimination" as used in Section 8(a)(3) of the Act to define an unfair labor practice. First, "discrimina-

way he would have treated them had they not engaged in union solicitation. Discrimination as thus used includes any employer action taken in response to union activity."

93. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967): "In some situations, 'legitimate and substantial business justifications' for refusing to reinstate employees who engaged in an economic strike have been recognized. One is when the jobs which the strikers claim are occupied by workers hired as permanent replacements during the strike in order to continue operations. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938); *NLRB v. Plastilite Corp.*, 375 F.2d 343 (C.A. 8th Cir. 1967); *Brown & Root*, 132 NLRB 486 (1961)"

The fact that Mr. Justice Roberts, the author of the *Mackay* opinion, was the sole dissenter in the *Republic Aviation* case indicates that the unexpressed basis for his opinion in the *Mackay* case may well have been that there was no "discrimination."

One commentator explained the *Mackay* case on the ground that though an employer's refusal to reinstate economic strikers "might substantially discourage employees from exercising their right to strike in the future . . . [,] such discouragement without discrimination does not constitute a violation of § 8(a)(3), and a finding of discrimination appears to be barred by the fact that the employer was pursuing his legitimate interest in maintaining operations." See Meltzer, *The Lockout Cases*, 1965 Sup. Ct. Rev. 87, 91. This seems incorrect. It is settled that an employer's refusal to reinstate unfair labor practice strikers is an unfair labor practice under Section 8(a)(3). See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). Therefore, an employer's refusal to reinstate unfair labor practice strikers must be "discrimination." Insofar as the issue of "discrimination" is concerned, there is no perceptible difference between an employer's refusal to reinstate unfair labor practice strikers and an employer's refusal to reinstate economic strikers. Accordingly, since the employer's acts constitute "discrimination" for purposes of Section 8(a)(3) in the one situation, they must also be "discrimination" in the other.

94. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 245 F.2d 594 (5th Cir. 1957).

95. *Cf. NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962).

tion" cannot be found unless the cause of the employer treatment of the employees is employee exercise of Section 7 rights. The fact that an employer treated employees adversely for any reason, good, bad, or indifferent, is not adequate proof of "discrimination." It must be proved that the cause of that treatment was employee exercise of Section 7 rights.

Second, the employer treatment of its employees need not be differential. All that is required is that the employer treatment be caused by employee exercise of Section 7 rights. If this is the cause, the fact that the employer would treat employees who engaged in identical or similar activities unrelated to Section 7 in exactly the same way or that he treats all employees in exactly the same way whether or not they were involved in the exercise of Section 7 rights does not prevent a finding of Section 8(a) (3) discrimination.

Thus, the meaning of "discrimination" for purposes of Section 8(a) (3) is employer treatment of employees affecting their employment conditions caused by employee exercise of Section 7 rights.

In a succeeding article, we shall see that this definition of "discrimination" enables us to clarify the significance, for purposes of determining whether certain employer actions violated Section 8(a) (3), of both (1) employer motive in the sense of the cause of the employer's actions, and (2) employer motive in the sense of motive to encourage or discourage membership in a labor organization, *i.e.*, the employer's pro- or anti-union animus.